IN THE SUPREME COURT OF THE STATE OF DELAWARE

TROY McNALLY,	§	
	§	No. 631, 2011
Defendant Below,	§	
Appellant,	§	Court Below–Superior Court of
	§	the State of Delaware in and for
	§	Kent County
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0701005246
Appellee.	§	

Submitted: June 8, 2012
Decided: August 17, 2012
Corrected: August 20, 2012

Before **STEELE,** Chief Justice, **HOLLAND** and **RIDGELY,** Justices.

O R D E R

This 17th day of August 2012, upon consideration of the parties' briefs and the Superior Court record, it appears to the Court that:

(1) The appellant, Troy McNally, filed this appeal from the Superior Court's November 16, 2011 order denying his motion for postconviction relief under Superior Court Criminal Rule 61 ("Rule 61"). We have determined there is no merit to the appeal and affirm the judgment of the Superior Court.

(2) Our decision on direct appeal reflects that on the night of January 6, 2007 someone shot four bullets in the direction of the house at 82

Strawberry Drive in Magnolia, Delaware.[1] Three bullets struck the house, which was occupied by four people at the time of the shooting. One bullet struck a car that was parked at the house next door.

(3) McNally was charged in the shooting and found guilty by a Superior Court jury of four counts of Reckless Endangering in the First Degree (one count for each of the four people occupying 82 Strawberry Drive at the time of the shooting), four companion counts of Possession of a Firearm During the Commission of a Felony, and two counts of Criminal Mischief. McNally was sentenced to a total of thirty-eight years at Level V suspended after twelve years and five months for probation.

(4) On direct appeal, McNally argued that the Superior Court erred when admitting certain ballistics evidence (hereinafter "evidentiary claims"). In our decision affirming McNally's convictions we concluded that the evidentiary claims were without merit.[2]

(5) On August 11, 2010, McNally filed a motion for postconviction relief raising the evidentiary claims, a confrontation clause claim, and related and overlapping claims of ineffective assistance of trial and/or

[1] *See McNally v. State*, 980 A.2d 364 (Del. 2009) (affirming judgment of the Superior Court).
[2] *Id.* at 368-72.

appellate counsel.[3] The Superior Court referred the motion to a Commissioner for proposed findings and recommendations. McNally's trial and appellate counsel each filed an affidavit, the State filed a response, and McNally filed a reply. McNally's reply raised additional claims of ineffective assistance of trial counsel and appellate counsel.[4]

(6) By report dated August 15, 2011, the Commissioner recommended that McNally's motion for postconviction relief should be denied as procedurally barred.[5] McNally raised objections to the Commissioner's report in three successive motions to reconsider the report. McNally also filed a motion to amend the postconviction motion; however, the motion to amend was denied as untimely filed.

(7) Upon *de novo* review of the matter, the Superior Court adopted the Commissioner's report and recommendation and denied the postconviction motion.[6] This appeal followed.

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[3] McNally alleged that his trial counsel (i) failed to file a motion for judgment of acquittal; (ii) failed to object to the credibility of the ballistics expert; (iii) failed to object to alleged evidence tampering, and (iv) failed to investigate and prepare the case for trial.

[4] McNally claimed that his trial counsel failed to file a pretrial motion to suppress and that his appellate counsel (i) failed to raise an argument challenging the admission of witness statements without cross-examination, (ii) failed to "argue on the verdict," meaning, apparently, "interracial violent crime," and (iii) failed to raise an evidence tampering argument.

[5] *See* Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to relief).

[6] *State v. McNally*, 2011 WL 7144815 (Del. Super. Ct.).

(8) When reviewing the denial of postconviction relief, this Court must consider the procedural requirements of Rule 61 before addressing any substantive issues.[7] When reviewing the denial of relief premised on ineffective assistance of counsel claims, the Court must consider whether the movant has established that counsel's representation fell below an objective standard of reasonableness and was prejudicial.[8]

(9) Having carefully considered the parties' positions on appeal, we conclude that the Superior Court did not err when barring McNally's evidentiary claims as formerly adjudicated.[9] On appeal, McNally has not demonstrated that reconsideration of the evidentiary claims is warranted in the interest of justice.[10] Moreover, to the extent McNally has reconstructed the claims into allegations of ineffective assistance of counsel, his claims are unavailing. McNally cannot demonstrate that he was prejudiced as a result of any alleged ineffective assistance of his trial and/or appellate counsel.[11]

(10) It does not appear that the Superior Court expressly addressed either McNally's claim that he was denied the right to confront two of the four victims occupying 82 Strawberry Drive the night of the shooting or his related claim that appellate counsel was ineffective for failing to raise the

[7] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[8] *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).
[9] Del. Super. Ct. Crim. R. 61(i)(4).
[10] *Id.*
[11] *Strickland*, 466 U.S. at 694.

claim on direct appeal. McNally contends that prior out-of-court statements of the two non-testifying victims were admitted into evidence notwithstanding his inability to cross-examine those victims.

(11) The record does not support McNally's assertion that the Superior Court admitted into evidence prior out-of-court statements of the two victims who did not testify at trial. The Court thus concludes that McNally's confrontation clause claim is without merit[12] and is procedurally defaulted[13] without exception.[14] To the extent McNally claims ineffective assistance of appellate counsel to raise the claim on appeal, the claim fails for lack of prejudice.[15]

(12) Finally, the Court acknowledges McNally's attempt to raise a claim of racial bias for the first time on appeal. McNally's claim is based on his contention that the jury convicted him of charges associated with 82 Strawberry Drive where a white family resided but acquitted him of charges associated with the house next door where a black family resided. The

[12] *See generally Wheeler v. State*, 36 A.3d 310 (Del. 2012) (holding that State violated right to confrontation when it introduced into evidence the substance of inadmissible hearsay statements to an investigating police detective (citing *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that prior out-of-court testimonial statement by witness is inadmissible if witness is unavailable and there is no opportunity to cross-examine the witness))).

[13] *See* Del. Super. Ct. Crim. R. 61(i)(3) (barring a claim not previously raised absent cause for relief from the procedural default and prejudice).

[14] *See* Del. Super. Ct. Crim. R. 61(i)(5) (providing that the procedural bar of (i)(3) shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation).

[15] *Strickland*, 466 U.S. at 694.

Court concludes that McNally's racial bias claim is best resolved in the Superior Court in the first instance. The Court declines to consider the claim for the first time on appeal.[16]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

[16] Del. Supr. Ct. R. 8.